BRIEF

The question here presented undoubtedly affects hundreds and perhaps thousands of similar trusts throughout the country. A parent wishing to make gifts to minor children could normally do so by the creation of a trust, and in the vast majority of instances the parent would ordinarily make himself trustee. The details of such trusts would disclose many varying features; but where the gift is genuine the donor would, as here, retain no economic benefits and no right of reversion or disposition with respect to either income or corpus; but would normally retain as trustee the responsibility for management. The fact that a trust of this type is an entirely normal way for a father to create a trust where he wishes to make a gift to a child, has been pointed out by the Tenth Circuit in *Armstrong v. Commissioner, 143 F. 2d 700*, from which we quota infra.

The question therefore of whether such a trust is within the *Clifford* doctrine, so as to make the income taxable to the grantor, is one which could arise many times. In view of the decisions of the Tax Court and of the Circuit Court of Appeals in the present case, we may feel certain that the question not only could arise but will arise may times.

The Bureau of Internal Revenue has now obtained the sanction of a Circuit Court of Appeals for taxing the income of such a trust to the grantor. The Bureau will, of course, not rest content in taxing only one trust but will beyond any question seek to apply this ruling to many trusts. With this decision now established as a part of our jurisprudence, it probably would be the duty of the Bureau to seek to apply the ruling to all similar trusts. Taxpayers, however, would not acquiesce in such a course by the Bureau, because as pointed out in the foregoing petition such taxpayers in contesting the taxability of the income to grantors under such circumstances would have the support of decisions of the Tenth Circuit and of the Second Circuit and of the First Circuit

in the cases pointed out in the foregoing petition. Hence the importance of this Court settling the question.

It is believed that there is no real problem in the instant case as to whether the taxability of the income of a trust to the grantor is ordinarily a question of law or a question of fact. Here all the facts are undisputed. There are no disputed inferences to be drawn from the facts relative to what incidents of ownership, if any, the grantor retained or did not retain. If our view of the law is correct, the conclusion of the Tax Court cannot be sustained even if it is the type of conclusion which is ordinarily a finding of fact, because such finding would be without substantial support in the record.

We now point out that the decision of the Tax Court could only have arisen from a total misconception of the principle on which *Clifford v. Helvering, 309 U. S. 331* was decided.

A few statements from the *Clifford* opinion make clear the ruling made by this Court. It was a case in which "the benefits directly or indirectly retained blended so imperceptibly with the normal concepts of full ownership." The Court summarized the situation by saying: "We have at best a temporary re-allocation of income within an intimate family group." It was a situation in which the "respondent retained the substance of full enjoyment of all the rights which previously he had in the property."

Briefly, the situation was a mere temporary arrangement, terminating very shortly, with a complete reversion of absolute ownership to the grantor and a complete control of the property in the interim. What the grantor had effected was merely "a temporary re-allocation of income."

In such a situation the conclusion that the grantor remained in substance the owner was a logical conclusion and one, therefore, that an appellate court could not reverse.

An entirely different situation is here presented. Here the allocation of income and corpus is not temporary but permanent. The grantor has parted with all essential incidents of ownership. The most essential of these is, of course, the right to direct who should receive the income and the corpus. According to the *Clifford* doctrine a mere temporary allocation of such income is not the equivalent of parting with the permanent right to control the same. This conclusion, of course, is logical; but the rule there announced can have no possible application to a situation where a grantor has permanently and beyond the power of revocation surrendered all control or direction over both income and corpus; has forever barred himself of the right to re-take either income or corpus, or to change in any way the beneficiary thereof; and has forever surrendered the possibility of any economic benefit to himself from the properties passing into the trust. To say in such a situation that he has retained the substantial incidents of ownership is without the slightest foundation in reason and has no support in a record of this kind. The conclusion of the Circuit Court of Appeals therefore that the income was taxable to the grantor could only have resulted from a complete legal mistake as to the meaning and effect of the *Clifford* case.

Our position is in accord with the decisions of all Circuit Courts of Appeals that have passed upon the matter except the Sixth Circuit.

Armstrong v. Commissioner, 143 F. 2d 700, is on its facts directly in point. The Tax Court held the income taxable to the grantor of the trust. The Tenth Circuit reversed the holding, saying among other things:

> "It is our conclusion that petitioner divested himself of all economic benefit or interest in the trust estate or in the income therefrom, and that he was not in any sense the owner of the trust estate. To hold otherwise would be to say that a father cannot by deed of trust, no matter how absolute, give property to a child if he himself is the trustee and

retains absolute control and management for the benefit of the estate."

The Tenth Circuit, in an earlier case of *Jones v. Norris, 122 F. 2d 6*, has rendered a decision to the same effect, from which we quote:

> "We do not understand that the power of management, however unlimited, may operate to bring the grantor within sweeping provisions of §22(a), if by such powers he cannot derive any economic benefit therefrom, except whatever advantages he may gain by virtue of the provisions in the Revenue Act, which permits the creation of trusts and imposes taxation under §161 et seq."
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> "Aside from the weight to be accorded the findings of fact below, *Helvering v. Clifford*, supra, and *Commissioner of Internal Revenue v. Branch*, supra, our own appraisal of the facts leads irresistibly to the conclusion that the grantor retained neither the power to revoke, revest or revert either the corpus or the income. Absent these essential elements there can be no substantial incidents or attributes of ownership, sufficient to vest in the grantor any of the economic benefits of the trust, essential to taxation under either Section 22(a) or Sections 166 and 167 of the Revenue Act of 1934."

The First Circuit, in *Commissioner v. Branch, 114 F. 2d 985*, dealt with a case where the grantor as co-trustee had broad administrative powers, but retained no right to designate beneficiaries and no right of reversion except in the event he outlived his wife. The court held the income not taxable to the grantor, saying:

> "Where the grantor has stripped himself of all command over the income for an indefinite period, and in all probability, under the terms of the trust instrument, will never regain beneficial ownership of the corpus, there seems to be no statutory basis for treating the income as that of the grantor under

Section 22 (a) merely because he has made himself trustee with broad powers in that capacity to manage the trust estate."

The Second Circuit, in *Phipps v. Commissioner, 137 F. 2d 141*, with regard to a long time trust where the grantor retained at least some discretion as to the disposition of the income, refused to sustain the Tax Court in taxing the income to the grantor, saying among other things:

> "Nevertheless, we cannot agree with the Tax Court that this case is like *Commissioner v. Buck, 2 Cir., 120 F. 2d 775* or otherwise within the *Clifford* doctrine. The trust here is a long-term trust, and, as we said in the *Buck* case, the control over the income exercised by the grantor must be 'very substantial' in such circumstances if the income is to be considered his."

In *Commissioner v. Katz, 139 F. 2d 107*, the Seventh Circuit considered a long time trust where the grantor was trustee with broad powers of management. It held the income not taxable to the grantor, saying:

> "On the other hand, in the instant case both the income and corpus, due largely to the long term nature and indefinite existence of the trust, amount to a final disposal which may be characterized as permanent. In *Clifford*, the trust property was to be returned to the donor in a comparatively short period, while here it will never be returned, except on the contingency of revocation, hereinafter discussed in connection with Section 166."

It is respectfully submitted that the case at bar cannot be distinguished from the decisions in the other Circuits herein cited. A large amount of unnecessary litigation can be avoided by an authoritative ruling now from this Court on the question here presented.

Respectfully submitted,

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